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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

TREVON WILLIS,

Defendant and Appellant.

B231519

(Los Angeles County  
Super. Ct. No. YA070547)

APPEAL from a judgment of the Superior Court of Los Angeles County.  
Steven R. Van Sicklen, Judge. Affirmed in part and reversed in part.

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Siri Shetty, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Eric E. Reynolds and Ana R. Duarte, Deputy Attorneys General, for Plaintiff and Respondent.

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Trevon Willis appeals from his conviction and sentence for attempted murder of a police officer and related charges. We conclude that the evidence is insufficient to support the jury's true finding on the gang allegation, but we otherwise affirm the judgment.

### BACKGROUND

The information charged Willis with attempted willful, deliberate, and premeditated murder of a peace officer under Penal Code sections 187 and 664<sup>1</sup> (count 1); assault on a peace officer with a semi-automatic firearm under section 245, subdivision (d)(2) (count 2); possession of a firearm by a felon under section 12021, subdivision (a)(1) (counts 3 and 8); murder under section 187 (count 4); attempted willful, deliberate, and premeditated murder under sections 187 and 664 (counts 5 and 6); and shooting at an occupied motor vehicle under section 246 (count 7). (Counts 1 through 3 and counts 4 through 8 arose from separate incidents, which occurred several years apart.) Before trial, the court granted Willis's unopposed motion to sever counts 4 through 8 and try counts 1 through 3 first. After trial on counts 1 through 3, the court granted the prosecution's motion to dismiss counts 4 through 8 in the interests of justice pursuant to section 1385.

As to counts 1 and 2, the information alleged that Willis personally and intentionally discharged a firearm causing great bodily injury or death, within the meaning of section 12022.53, subdivisions (b), (c), and (d). It further alleged as to counts 1 and 2 that Willis committed the offenses for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further, or assist criminal conduct by gang members, within the meaning of section 186.22, subdivision (b)(1)(C).

A jury found Willis guilty on counts 1 through 3. The jury found the firearm and gang allegations true as well.

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<sup>1</sup> All subsequent statutory references are to the Penal Code unless otherwise indicated.

The court sentenced Willis to 42 years to life in prison, calculated as follows: 15 years to life as to count 1, plus 25 years to life for the firearm allegation, plus 2 years as to count 3. The court stayed imposition of sentence as to count 2 pursuant to section 654. The court also stayed imposition of a sentence enhancement for the gang allegation because of the life sentence imposed as to count 1. (§ 186.22, subds. (b)(1), (b)(5).) The court imposed various statutory fines and fees and credited Willis with 1,294 days of presentence custody (1,126 actual days plus 168 good time/work time days) as of February 10, 2011. Willis timely appealed.

The evidence introduced at trial showed the following facts: In the morning of January 9, 2008, Los Angeles Police Officer Eric Hyde was on patrol, in full uniform and in a marked police car, on Normandie Avenue near Rosecrans Avenue in the city of Gardena. Hyde saw three black males in their early 20's, one of whom was later identified as Willis, standing on a curb. He thought their behavior "looked a little odd"; he "wouldn't say that they appeared to be gang members[.]" but he nonetheless had a "suspicion" that they might be gang members. He also believed that one of them matched the description of a suspect in a recent robbery in the area.

One of Willis's two companions approached a woman who was putting gas in her car, and he looked back at his two companions and "kind of gave a head nod." Hyde pulled into the gas station, and the man who had approached the woman noticed Hyde and walked back to his two companions. Hyde then approached the woman and asked if she knew the three men. She said that she did not, and she thanked Hyde "for kind of looking out for her."

Shortly thereafter, Hyde saw the three men run across a street, partially obstructing a passing car, which had to brake. Hyde believed he had probable cause to detain them on that basis. He got out of his car, waved them toward himself, and asked them to sit on the curb. One of the three men said "Naw, no, man" and fled. Hyde pursued him, and the other two "took off" as well.

Hyde chased the fleeing man into an alley. Hyde was standing in front of a car in the alley when he saw the hair of the man he was chasing, who was crouched on the other

side of the car. The man “popped up shooting[,]” wounding Hyde twice in his left leg; Hyde returned fire. Hyde fell to the ground and took cover behind a dumpster, and he last saw the shooter running across the alley toward a wall that separated the alley from a neighboring plant nursery.

Police responded to the shooting with a helicopter and multiple police cars, setting up a perimeter around the area to contain the suspect. At approximately 7:30 p.m. that evening, police found Willis inside a covered hot tub in the backyard of a home inside the perimeter.

Police also recovered a handgun from beneath “some sort of a cage or coop” in the backyard of a house adjacent to the nursery. A criminalist determined that a bullet recovered from Hyde’s leg was fired from that handgun, and the criminalist also matched five shell casings found in the alley to the same gun. Another criminalist determined that Willis’s DNA was consistent with DNA samples obtained from the grip and the trigger guard of the gun. The parties stipulated that Willis’s right thumbprint was found on the gun’s magazine.

Various witnesses who saw the shooter either immediately before, during, or immediately after the shooting were asked to identify him in field show-ups, photo lineups, live lineups, and in court at trial. Sometimes they identified Willis, but sometimes they did not. Only two identifications are of particular relevance to this appeal. Eight days after the shooting, when Hyde was still in the hospital, he was shown a photographic lineup but failed to make an identification, because he was “not a hundred percent” and did not “want to guess.” In his testimony at trial, however, on cross-examination Hyde identified appellant as the shooter.

Jack Wada was an employee at the plant nursery adjacent to the alley where the shooting took place. Wada heard the gunshots in the alley and then saw a man carrying a handgun climb over the wall from the alley. Wada initially ran to the potting shed and closed the doors to protect the people inside. Next, he started to run toward the seed house, because he knew that one of the owners of the nursery was in there. The man who had come over the wall then ran by him. At a live lineup one or two days after the

shooting, Wada identified someone other than Willis as the person he had seen come over the wall. After testifying at trial, however, Wada told one of the police officers present that, although “the identification at the lineup was the incorrect person[.]” Willis was “the guy that I saw.” The prosecution consequently recalled Wada to the witness stand, and he identified Willis as the person he saw.

## DISCUSSION

### I. Sufficiency of the Evidence Supporting the Gang Allegation

Willis argues that the evidence introduced at trial was not sufficient to support the jury’s true finding that the crime was committed “for the benefit of, at the direction of, or in association with any criminal street gang” and “with the specific intent to promote, further, or assist in any criminal conduct by gang members[.]” (§ 186.22, subd. (b)(1).) We agree.

At least *prima facie*, the shooting appears to have nothing to do with gangs or gang activity. Hyde encountered Willis and his companions by chance and attempted to detain them (apparently for jaywalking or a similar offense), and they fled. When Hyde pursued Willis, Willis shot him. The record contains no substantial evidence that Willis’s companions were gang members. The record also contains no evidence that Willis and his companions acted in concert in the shooting, displayed gang tattoos or hand signals, verbally claimed their gang affiliations, or did anything else to associate themselves or their conduct with a gang.

Respondent contends nonetheless that sufficient evidence supports the gang allegation, for the following reasons. The prosecution introduced evidence that Willis is a member of the 190 East Coast Crips gang, which the parties stipulated is a gang within the meaning of section 186.22. One of Willis’s companions approached the woman at the gas station just after Hyde first observed them and just before the shooting. The prosecution’s gang expert testified that gang members carry guns when not in their own territory “to protect themselves from rival gangs, or to commit acts of violence against rival gangs.” He further testified that gang members also might have a gun “to commit

other types of crimes, like robbery.” He testified that the shooting took place “pretty far” from the territory of the 190 East Coast Crips and that “[i]f you are committing a crime outside of your territory, you might stand a higher probability of getting away with a crime than if you commit it in your own neighborhood[.]” The prosecution’s expert also testified that a gang member gains respect within the gang by committing acts of violence, which also enhance the gang’s reputation. In particular, he testified that shooting at a police officer “is probably at the very top in regards to gang respect from the other members of the gang.”

We are not persuaded. “Not every crime committed by gang members is related to a gang.” (*People v. Albillar* (2010) 51 Cal.4th 47, 60.) Willis’s gang membership and the expert testimony about gaining respect within the gang are consequently insufficient to support the true finding on the gang allegation. The expert testimony about gang members carrying weapons and about a gang member’s increased likelihood of “getting away with a crime” by committing it outside of the gang’s territory is similarly unavailing—the testimony does not support a reasonable inference that Willis’s shooting of Hyde was done for the benefit of, at the direction of, or in association with a gang, or with the necessary specific intent. In addition, the record does not contain substantial evidence that Willis’s companions were gang members—Hyde testified that he “wouldn’t say that they appeared to be gang members[.]” but he nonetheless had a “suspicion” that they might be gang members. The encounter with the woman at the gas station adds no support for the gang allegation, given the lack of evidence that the individual who approached the woman was a gang member or that his conduct was in any other way gang related. No evidence indicates that the shooting took place within the territory of a rival gang, or any gang. The record contains no evidence that any witness, including Hyde, observed any gang tattoos on Willis or the other two individuals who were with him. Hyde, for example, testified that he did not notice any tattoos on any of the three men. Nor is there evidence that Willis or the other individuals said anything gang related or displayed gang signs.

The appellant's opening brief relies heavily upon two cases in which the Court of Appeal reversed true findings on gang allegations based on similarly weak evidence. (See *People v. Ochoa* (2009) 179 Cal.App.4th 650, 656-665; *In re Daniel C.* (2011) 195 Cal.App.4th 1350, 1363-1364.) The respondent's brief does not attempt to distinguish either case and actually mentions neither of them. We find the analysis in those cases persuasive on the evidentiary record before us.

For all of the foregoing reasons, we conclude that the record does not contain substantial evidence that Willis shot Hyde "for the benefit of, at the direction of, or in association with any criminal street gang" and "with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1).) We therefore vacate the true finding on the gang allegation.

## II. Exclusion of a Defense Expert on Eyewitness Identification

Willis argues that the trial court abused its discretion and violated his constitutional rights by not permitting him to present an expert witness on the reliability of eyewitness identifications. We review the court's decision to exclude such testimony for abuse of discretion. (*People v. McDonald* (1984) 37 Cal.3d 351, 377 (*McDonald*), overruled on another ground in *People v. Mendoza* (2000) 23 Cal.4th 896, 914; *People v. Prince* (2007) 40 Cal.4th 1179, 1222.) We find neither an abuse of discretion nor a constitutional violation here.

In *McDonald*, the Supreme Court held that expert testimony concerning the reliability of eyewitness identifications is admissible "on a proper showing." (*McDonald*, *supra*, 37 Cal.3d at p. 355.) The Court emphasized, however, that "the decision to admit or exclude expert testimony on psychological factors affecting eyewitness identification remains primarily a matter within the trial court's discretion[.]" (*Id.* at p. 377.) Moreover, "such evidence will not often be needed, and in the usual case the appellate court will continue to defer to the trial court's discretion in this matter." (*Ibid.*) Nonetheless, "[w]hen an eyewitness identification of the defendant is a key element of the prosecution's case but is not substantially corroborated by evidence giving it

independent reliability, and the defendant offers qualified expert testimony on specific psychological factors shown by the record that could have affected the accuracy of the identification but are not likely to be fully known to or understood by the jury, it will ordinarily be error to exclude that testimony.” (*Ibid.*) The Court concluded that the trial court had abused its discretion by excluding the proffered expert testimony. (*Id.* at p. 376.)

Subsequent cases have reaffirmed *McDonald*’s holding while distinguishing its facts. In *People v. Sanders* (1995) 11 Cal.4th 475 (*Sanders*), the Court stated that “[a]lthough eyewitness testimony was a key element of the prosecution’s case, here, unlike *McDonald*, eyewitness testimony was not the *only* evidence linking the defendant to the crime. The eyewitness identification was corroborated by other independent evidence of the crime and the conspiracy leading to it.” (*Id.* at p. 509.) In *People v. Jones* (2003) 30 Cal.4th 1084 (*Jones*), however, the Court cautioned against an overly restrictive reading of the *Sanders* formulation of the *McDonald* rule: The quoted language from *Sanders* “cannot be viewed as limiting the holding of *McDonald* . . . to cases in which, apart from the eyewitness identification, there is *no* other evidence whatever linking defendant to the crime: Exclusion of the expert testimony is justified only if there is other evidence that substantially corroborates the eyewitness identification and gives it independent reliability.” (*Jones, supra*, 30 Cal.4th at p. 1112.)

Under *McDonald*, *Sanders*, and *Jones*, the trial court’s exclusion of Willis’s eyewitness identification expert’s testimony was not an abuse of discretion. The record contains other evidence that substantially corroborates the eyewitness identifications of Willis: His DNA and thumbprint were found on the gun that was used to shoot Hyde, and Willis was found hiding in a covered hot tub within the perimeter set up by the police around the site of the shooting. In addition, Wada’s and Hyde’s unforeseen identifications of Willis at trial—which prompted Willis to seek to present an eyewitness identification expert—were given independent reliability by other eyewitnesses: Juan Munoz, who was parked in the alley at the time of the shooting and witnessed it, had no difficulty picking Willis out of a live lineup the day after the shooting, and Taro Kasai,



one of the owners of the plant nursery who encountered Willis in the seed house as he fled from the alley, likewise picked Willis out of a live lineup the day after the shooting. Moreover, Willis's counsel was able to cross-examine the eyewitnesses and argue to the jury that they were unreliable, and the court instructed the jury on relevant factors to consider in evaluating the reliability of eyewitness identifications. For all of these reasons, the trial court did not abuse its discretion by excluding the testimony of Willis's eyewitness identification expert.

Willis further argues, however, that under *Holmes v. South Carolina* (2006) 547 U.S. 319 (*Holmes*), the trial court's ruling violated his federal constitutional right to present a complete defense. The Court of Appeal has previously addressed and rejected this argument in *People v. Goodwillie* (2007) 147 Cal.App.4th 695 (*Goodwillie*), and we find the analysis in that case persuasive. In *Holmes*, the South Carolina trial court had categorically excluded the defendant's evidence that a third party had committed the charged crime, and the South Carolina Supreme Court affirmed on the ground that "where there is strong evidence of an appellant's guilt, especially where there is strong forensic evidence, the proffered evidence about a third party's alleged guilt does not raise a reasonable inference as to the appellant's own innocence." (*Holmes, supra*, 547 U.S. at p. 324.) The United States Supreme Court concluded that the South Carolina rule violated the defendant's right to present a complete defense. (*Id.* at pp. 330-331.)

The court in *Goodwillie* concluded that the *McDonald* rule does not share the constitutional infirmity of the South Carolina rule that was rejected in *Holmes*. "Unlike the defense that the defendant in *Holmes* was prevented from presenting, the defense Goodwillie contends he was prevented from fully presenting appears to be one of mistaken identity. Goodwillie was not prevented from presenting that defense to the same extent as the defendant in *Holmes* was prevented from presenting evidence of third party culpability. In *Holmes*, the defendant wanted to establish that a particular third party may have committed the offense. His only method of doing so was through witness testimony. By not allowing the defendant to call his witnesses, the South Carolina trial court entirely prevented the defendant from presenting his defense. In contrast, while

Goodwillie was not allowed to present expert testimony regarding the unreliability of eyewitness testimony, he was permitted to cross-examine the eyewitnesses to raise possible problems with their identifications of him. The court's decision to exclude the expert testimony did not prevent Goodwillie from offering evidence, if such evidence existed, showing that some eyewitnesses failed to identify him as the perpetrator.<sup>[2]</sup> Thus, the California evidentiary rule regarding expert eyewitness identification testimony did not entirely prevent Goodwillie from presenting a defense of mistaken identification.” (*Goodwillie*, *supra*, 147 Cal.App.4th at pp. 728-729.) For these reasons and the others described in *Goodwillie*, we reject Willis's argument that the exclusion of the testimony of his eyewitness identification expert under *McDonald* violated his federal constitutional right to present a complete defense.

### III. Admission of Evidence of Willis's Prior Conviction and Probation

Willis argues that the trial court abused its discretion and violated his right to a fair trial by admitting evidence that at the time of the shooting he was on probation for a prior conviction and would go to prison if found in possession of a gun. We disagree.

Before trial, Willis moved to exclude evidence of the prior conviction and probation. The prosecution argued that the evidence was relevant to prove Willis had a motive to avoid being captured by Hyde, because at a previous probation violation hearing Willis was informed that if he violated probation again he would go to prison. After hearing argument from both parties and taking the matter under submission, the court denied Willis's motion.

At trial, the prosecution read to the jury the transcript of Willis's probation violation hearing of March 7, 2007. The transcript revealed that (1) Willis had a prior conviction for gun possession, (2) he was released from custody on December 22, 2006, and arrested 12 days later, on January 3, 2007, after being found in the company of gang

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<sup>2</sup> As we noted earlier, the record in this case contains evidence that various eyewitnesses at various times failed to identify Willis as the shooter. Thus, Willis's ability to present a defense of mistaken identity was even less circumscribed than that of the defendant in *Goodwillie*.

members and lying to the police about his identity, (3) he admitted violating probation and was to be released from jail on April 2 after serving 90 days actual time, and (4) the court informed him that he would go to prison if he violated probation again. Also, during the hearing Willis himself (not through counsel) said that he lied to the police because he was “scared” and “really worried about coming back to jail.”

Evidence of a prior crime is admissible to prove motive (Evid. Code, § 1101, subd. (b)) but is still subject to exclusion under Evidence Code section 352 if its probative value is substantially outweighed by the probability that its admission will create a substantial danger of undue prejudice. “We review for abuse of discretion a trial court’s rulings on relevance and admission or exclusion of evidence under Evidence Code sections 1101 and 352.” (*People v. Cole* (2004) 33 Cal.4th 1158, 1195.)

The evidence concerning Willis’s prior conviction, probation, and probation violation were relevant to prove that Willis had a strong motive to avoid being apprehended by Hyde—Willis believed that if he were caught possessing a gun he would go to prison. The probative value of such evidence was high, because the prosecution had to convince the jury that Willis’s motive to evade capture was strong enough to lead him to commit the very serious crime of shooting at a police officer. The main risk of undue prejudice was that once the jurors heard that Willis had possessed a gun in the past, they would infer that he was likely to possess a gun again. Given the DNA and fingerprint evidence showing that Willis had handled the gun that was used to shoot Hyde, the prejudicial effect of such an inference would be relatively minor. We conclude that the trial court did not abuse its discretion by ruling that the probative value of the evidence was not substantially outweighed by the probability that its admission would create a substantial danger of undue prejudice.

Willis argues that “[a]lthough the prosecution asserted that such evidence was relevant to motive, the shooter’s intent—to avoid contact with the officer—was neither disputed nor material to any disputed issue. Although evidence of past crimes may be relevant to motive when intent is at issue, it has little bearing when the only disputed issue is the identity of the perpetrator.” We disagree. The evidence that *Willis* had a

motive to avoid being apprehended was relevant to proving the identity of the perpetrator, that is, to proving that *Willis* was the shooter.

Willis also argues that because the transcript revealed that Willis had received relatively lenient treatment for both his prior conviction (probation) and his probation violation (90 days actual time in jail), the evidence created a risk that the jury would seek to punish him in the present case for his past crimes, believing that he had not been sufficiently punished for them already. Again, although we recognize that some such risk exists, we conclude that it was not sufficiently great to show that the trial court abused its discretion by concluding that the (high) probative value of the evidence was not substantially outweighed by the probability that its admission would create a substantial risk of undue prejudice.

For all of the foregoing reasons, we reject Willis's argument that the trial court abused its discretion by admitting the evidence concerning the prior conviction, probation, and probation violation. For the same reasons, we conclude that the admission of the evidence did not render Willis's trial so fundamentally unfair as to violate his right to due process.

#### IV. Admission of Hearsay Testimony and Officer's Notes

Willis argues that the trial court abused its discretion by (1) allowing police officer Stephen Davis to testify about what Kasai (the owner of the plant nursery who encountered Willis in the seed house immediately after the shooting) said at a live lineup the day after the shooting, and (2) admitting Davis's handwritten notes from the lineup. Respondent argues that admission of the testimony was not error, and respondent concedes that admission of the notes was error but claims it was not prejudicial. We conclude that any error was harmless.

Kasai, who was 86 years old at the time of trial, identified Willis at a live lineup the day after the shooting. On direct examination, Kasai initially testified that when he first viewed the lineup he did not recognize anyone and picked out one member of the lineup just on the basis of his height. But Kasai then confirmed that he signed a form

stating that in the first viewing of the lineup he was unable to make an identification. He next testified that after the first viewing he approached Davis and told him, “I think it’s number 5. I just need to hear their voices.” He testified that he then viewed a second lineup, in which each member was asked to say the phrase “Let me go,” and he signed a form identifying Willis from that lineup. But when asked whether seeing the form he had signed refreshed his recollection of what had transpired at those lineups, he testified, “Well, it helps, but I’m not sure of what I said.” The prosecution later introduced, over Willis’s objection, Davis’s testimony that after the first lineup Kasai told Davis he thought the person he encountered in the seed house was number 5 but he needed to hear their voices, and the prosecution introduced Davis’s handwritten notes to the same effect, again over Willis’s objection.

Assuming that the trial court abused its discretion by admitting both Davis’s testimony on this point and Davis’s handwritten notes, it is not reasonably probable that Willis would have obtained a more favorable outcome if the evidence had been excluded. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Davis’s testimony and notes merely repeated Kasai’s own testimony that, after first viewing the lineup, Kasai told Davis that he thought it was number 5 but needed to hear their voices. Given that the facts had already come in through Kasai’s testimony, and given the strong evidence of Willis’s guilt—including the ballistics, fingerprint, and DNA evidence, and the circumstances of Willis’s capture in a covered hot tub within the perimeter set up around the scene of the shooting—it is not reasonably probable that Willis would have obtained a more favorable result if Davis’s testimony and notes had been excluded.

## DISPOSITION

The true finding on the gang allegation is reversed. The judgment is otherwise affirmed. The superior court is directed to prepare a corrected abstract of judgment and forward a copy to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

CHANEY, J.